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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO HERNANDEZ, Defendant and Appellant.	B286997 (Los Angeles County Super. Ct. No. MA070383)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debra R. Archuleta, Judge. Affirmed in part, reversed in part, and remanded.

Andrea S. Bitar, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Gregory B. Wagner, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Armando Hernandez (defendant) of assault by means of force likely to cause great bodily injury and possession of ammunition by a felon. We are asked to decide whether the trial court erred in concluding it lacked discretion to order the sentences imposed for these crimes concurrent to one another and to a 35 years to life sentence defendant had already received before being sentenced in this case.

I. BACKGROUND

A. The Offense Conduct (in This Case)

Defendant lived in a rented room in a house in Lancaster, California. Maari Howard (Howard) was friends with defendant and sometimes stayed in the same house. In December 2016, defendant showed Howard a cache of ammunition, which he seemed excited to have, that was stored in a hallway closet outside his bedroom. (This evidence was partly the basis of the felon in possession of ammunition charge.)

The following month, January 2017, Howard was helping one of defendant's housemates "move stuff" out of the house's garage. While Howard was helping, defendant came out to the garage and asked Howard what she was doing; Howard thought defendant "seemed angry" and defendant walked back inside the house after asking Howard the question.

After continuing to help for a few minutes, Howard walked into the house. Standing just outside defendant's room, Howard asked him "what was wrong and why was he acting the way he was acting . . . ." Defendant did not respond, and when Howard walked into the room and approached defendant, defendant closed the door to the room and attacked Howard. Specifically,

defendant punched Howard in her face with a closed fist, which knocked Howard to the floor, and defendant continued to hit Howard in the back of her head and the side of her face while she was down. The attack stopped when defendant's brother (who also lived at the house) knocked on the door to defendant's room. Defendant told Howard to get her stuff and leave, and she complied.

Howard reported the assault to the police and identified defendant as her assailant. The police obtained a search warrant for the house where defendant lived and, when executing the warrant on January 18, 2017, officers found live ammunition inside defendant's room and in the closet outside his room.

B. Trial and Sentencing

Defendant was tried on charges of (1) assault by means of force likely to cause great bodily injury (Pen. Code,[1] § 245, subd. (a)(4)), with a further allegation that defendant personally inflicted great bodily injury on Howard (§ 12022.7, subd. (a)); (2) dissuading a witness (§ 136.1, subd. (c)(1)); (3) false imprisonment (§ 236); and (4) possession of ammunition by a felon (§ 30305, subd. (a)(1)).[2] The jury found defendant guilty of the assault and possession of ammunition charges and not guilty

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[1] Undesignated statutory references that follow are to the Penal Code.

[2] In connection with the felon in possession of ammunition charge, the People alleged defendant had sustained two prior serious and/or violent felony convictions, one in 1997 and the other in 2008—both for assault with a firearm (§ 245, subd. (a)(2)).

on the remaining two counts. The jury also found the section 12022.7 allegation not true.

Before sentencing, defendant filed a *Romero*[3] motion asking the trial court to strike both of his prior convictions that would render him eligible for a Three Strikes law (§§ 667, subd. (b)-(i), 1170.12) sentence. Defendant's motion acknowledged that just a few months earlier he had received a Three Strikes law 35 years to life prison sentence in another case (trial court case number MA070647, hereafter the 35-Life Case) for an assault with a deadly weapon conviction. Defendant argued the trial court should strike his two prior strike convictions because this already imposed third strike indeterminate sentence would still leave society "adequately protected." The trial court denied the *Romero* motion.

More pertinent for our purposes, the parties' papers filed in advance of sentencing advised the trial court it had discretion to run the sentences for the convictions in this case either concurrently or consecutively to the sentence imposed in the 35-Life Case. The People urged the court to order consecutive sentences and defendant urged the court to run the sentences concurrently.

At the sentencing hearing, the trial court imposed a high-term, four-year prison sentence for the assault by means of force likely to produce great bodily injury conviction, which the court then doubled to eight years pursuant to the provisions of the Three Strikes law. On the other count of conviction, the court sentenced defendant to 16 months (one-third the mid-term,

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[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

doubled), but stayed that sentence pursuant to section 654[4]—apparently of the view that defendant's conviction on counts 1 and 4 arose out of an indivisible course of conduct. The trial court ordered the sentence it imposed to run concurrent, not consecutive, with defendant's sentence in the 35-Life Case.

C. Resentencing

The prosecution thereafter filed a motion for resentencing arguing the sentence the court imposed was unauthorized for two reasons. First, the prosecution argued, the felon in possession of ammunition sentence could not be stayed but must instead run consecutive to the sentence for the assault conviction because the two offenses did not arise out of an indivisible course of conduct. Second, according to the prosecution, the sentence in this case must run *consecutive* to the sentence in the 35-Life Case because sections "667(c)(8) and 1170.12(a)(7) provide[ ] that any defendant sentenced under the Three Strike sentencing scheme, pursuant to [section] 667(e), shall be sentenced consecutive to

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[4] Section 654, in pertinent part, provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Section 654, in other words, "precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.)

any other conviction for which the defendant is already serving a sentence."[5]

The trial court granted the prosecution's motion and resentenced defendant. The court concluded it "must" run the sentences for the assault and felon in possession of ammunition convictions in this case consecutive to one another, rather than staying sentence on the latter pursuant to section 654. The court further believed it was compelled to reverse its prior ruling and order the aggregate sentence imposed in this case to run consecutively to the sentence in the 35-Life Case. As a result, the court resentenced defendant to eight years on count 1 and 16 months on count 2, the upshot of which was to increase

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[5] The prosecution's citations were incorrect in one respect that is at the heart of the principal issue raised in this appeal. Section 667, subdivision (c)(8) does indeed state that "[a]ny sentence imposed pursuant to subdivision (e) [a sentence for a defendant who has one or more prior serious or violent felony convictions] will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law." Subdivision (a)(7) of section 1170.12, on the other hand, provides: "If there is a current conviction for more than one serious or violent felony as described in subdivision (b), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." This subdivision had no application in this case because the jury did not convict defendant of more than one serious or violent felony. Rather, the pertinent provision in section 1170.12 was former subdivision (a)(8), which was repealed by the Three Strikes Reform Act of 2012 (Proposition 36) even though Proposition 36 did not repeal the substantively identical provision codified at section 667, subdivision (c)(8).

defendant's total aggregate sentence in this case from eight years to nine years and four months. The court ordered that this sentence was "to run consecutive to any other case."

II. DISCUSSION

The trial court correctly concluded that the sentences imposed for the two convictions in this case must be ordered to run consecutively to one another under the terms of the Three Strikes law, specifically, the language stating that when "there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count . . . ." (§§ 667, subd. (c)(6), 1170.12, subd. (a)(6).) That is the easy question. The harder question is whether the court had discretion to order the sentence here to run concurrent with the sentence imposed in the 35-Life Case.

We hold the court did have such discretion because Proposition 36 repealed the provision in section 1170.12 that required courts to impose a Three Strikes sentence consecutive to any other sentence already being served and the initiative's failure to also repeal the parallel and identical provision in section 667 is best understood as a drafting error that a court can and should correct. Indeed, the only theoretical reason why voters might have repealed one provision and not the other—to give the Legislature the ability to do away with the requirement for consecutive sentencing by simple majority vote without wanting to eliminate that consecutive sentencing requirement on their own—is not reflected anywhere in the ballot materials and is highly unlikely in light of the purposes animating Proposition 36. We therefore construe the Three Strikes law as though

Proposition 36 repealed section 667, subdivision (c)(8) in addition to its express repeal of the parallel former provision in section 1170.12, and we will remand the matter to the trial court to again consider whether the sentence in this case should run concurrent with the sentence in the 35-Life Case.

A. The Three Strikes Law(s), Before and After Proposition 36

"The Three Strikes law consists of two, nearly identical statutory schemes designed to increase the prison terms of repeat felons. The earlier provision, which the Legislature enacted, was codified as section 667, subdivisions (b) through (i). The later provision, which the voters adopted through the initiative process, was codified as section 1170.12." (*Romero*, *supra*, 13 Cal.4th at p. 504; see also § 667, subds.(b)-(i), added by Stats. 1994, ch. 12, § 1, effective Mar. 7, 1994; § 1170.12, added by initiative, Gen. Elec. (Nov. 8, 1994), commonly known as Proposition 184.)

The California Constitution states the Legislature cannot itself amend or repeal a popularly adopted initiative unless the initiative itself so permits (Cal. Const. art 2, § 10; *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211). Proposition 184, the initiative that added section 1170.12 to the Penal Code, was in part proposed for this very reason. (Ballot Pamp., Gen. Elec. (Nov. 8, 1994) argument in favor of Prop. 184, p. 36 ["The threat of our initiative forced Sacramento politicians to pass 3 Strikes. Now, they're trying to weaken it. Our vote for Proposition 184 will strengthen the law and tell politicians, 'hands off 3 Strikes'"].) As provided in subdivision (g) of section 1170.12, the terms of the popularly enacted Three

Strikes law could still be amended by the Legislature, but only by a super-majority vote, i.e., "by [a] statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring."

Prior to 2012, the voter-enacted and Legislature-enacted versions of the Three Strikes law were substantively identical when it came to (a) how offenders must be sentenced for multiple counts in a single Three-Strikes-eligible case and (b) how those offenders who were already serving a sentence should be sentenced for a newer Three Strikes conviction (what we colloquially refer to as "sequential sentencing"). The multiple counts rule was the rule stated in subdivision (c)(6) of section 667 and subdivision (a)(6) of section 1170.12: "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count . . . ." The sequential sentencing rule was the rule stated in subdivision (c)(8) of section 667 and former subdivision (a)(8) of section 1170.12: "Any sentence imposed . . . will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law."[6]

In 2012, voters approved the Three Strikes Reform Act, dubbed Proposition 36. As relevant for our purposes, Proposition 36 repealed the sequential sentencing provision enacted as part of Proposition 184, i.e., former section 1170.12, subdivision (a)(8). Under section 1170.12 as amended by Proposition 36, the

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[6] Apart from the special sentencing provisions of the Three Strikes law, the Penal Code generally gives trial judges discretion to sentence concurrently or consecutively. (§ 669, subd. (a).)

deletion of former subdivision (a)(8) (and the enactment of new subdivision (c)(2)(C)) gave trial courts discretion to run a sentence for a new felony conviction either concurrent with or consecutive to a prison term already being served—if the new felony was neither "serious" nor "violent." (See generally Couzens & Bigelow, Criminal Practice Series: California Three Strikes Sentencing (The Rutter Group 2018) ¶ 8:1, pp. 8-9.) At the same time, however, Proposition 36 did not delete the substantively identical sequential sentencing provision in section 667. Commentators noted the discrepancy soon after the initiative's passage and theorized it was attributable to a drafting error. (See, e.g., Couzens & Bigelow, The Amendment of the Three Strikes Sentencing Law (May 13, 2013) pp. 17-18.)

B. The Trial Court's Decision to Resentence Defendant to Consecutive Terms on the Counts of Conviction in This Case Was Correct

Defendant's first argument challenging the sentence imposed at the resentencing hearing is easily rejected. He contends the trial court had discretion to refuse to sentence consecutively on the two counts of conviction in this case, assault and possession of ammunition by a felon, notwithstanding section 667, subdivision (c)(6). Specifically, he notes this subdivision permits concurrent sentencing where two current convictions were "committed on the same occasion" and "aris[e] from the same set of operative facts" and he argues the offenses were committed on the same occasion because the possession of ammunition crime was a continuing offense that persisted after the date of assault (January 9, 2017). Even assuming this is correct, however, it is clear the two offenses do not arise from the

same set of operative facts and defendant does not contend otherwise. Consecutive sentencing was therefore required.

C. As Amended by Proposition 36, the Three Strikes Law Gives Trial Courts Discretion to Impose Concurrent Sentences When Engaging in Sequential Sentencing

When construing constitutional provisions and statutes, including those enacted through voter initiative, "[o]ur primary concern is giving effect to the intended purpose of the provisions at issue. [Citation.] In doing so, we first analyze provisions' text in their relevant context, which is typically the best and most reliable indicator of purpose. [Citations.] We start by ascribing to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme. [Citations.] If the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials. [Citation.] Moreover, when construing initiatives, we generally presume electors are aware of existing law. [Citation.] Finally, we apply independent judgment when construing constitutional and statutory provisions. [Citation.]" (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933-934 [addressing the interplay between two constitutional provisions, one of which was added by voter initiative]; see also *People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

In interpreting a voter initiative, we "give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote." (*Ross v. RagingWire Telecom., Inc.* (2008) 42 Cal.4th 920, 930.) In other words, a reviewing court ""'may not

properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.'" [Citation.]" (*People v. Valencia* (2017) 3 Cal.5th 347, 375; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 ["our 'task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent'"].)

But when a statute contains an identified drafting error, California courts will reconstruct or reform the statute if such action is "compelled by necessity and supported by firm evidence of the drafters' true intent." (*People v. Garcia* (1999) 21 Cal.4th 1, 6.) Courts, however, will not reform a statute "when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or altering any of them." (*Ibid*.) As our Supreme Court has instructed: "Wherever possible, potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose as gleaned from a reading of the entire act. [Citation.] A construction which makes sense of an apparent inconsistency is to be preferred to one which renders statutory language useless or meaningless. [Citation.]"[7] (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.)

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[7] Our Supreme Court has on various occasions corrected obvious drafting errors in statutes, whether enacted by the Legislature or by voter initiative. (See, e.g., *People v. Skinner* (1985) 39 Cal.3d 765, 775 [finding it "clear" that the word "and" was "erroneously used" in place of "or" in Prop. 8]; *In re Thierry S.* (1977) 19 Cal.3d 727, 741, fn. 13 ["obvious mistake" in statute's cross-reference to "Section 625" was corrected to read "Section 2," so as to reflect the Legislature's "clear intent"]; *People v. Troutman* (1921) 187 Cal. 313, 316-317 [statute's reference to "part two" construed to read "part one" in order to correct an

We are convinced Proposition 36's retention of section 667, subdivision (c)(8) was a drafting error. We come to this conclusion based on the voters' decision to strike the substantively identical language in former section 1170.12, subd. (a)(8), the purposes of Proposition 36, and the marked weakness of the single rationale on which voters theoretically might have sought to retain section 667, subdivision (c)(8) while repealing former section 1170.12, subdivision (a)(8).

At present, the legislative and initiative versions of the Three Strikes law cannot be harmonized because they each deal with the same subject matter in different ways. Due to the deletion of former section 1170.12, subdivision (a)(8), the initiative version provides trial judges with the discretion to run non-serious and non-violent new felonies concurrent with other sentences being served. But due to Proposition 36's retention of section 667, subdivision (c)(8), the legislative version continues to deny trial judges the very same discretion the initiative version allows. The question is whether the voters might have had a reason for treating the two sections differently, or whether instead, the different treatment was just an oversight.

As far as we can hypothesize, there is only one conceivable reason why the voters who passed Proposition 36 would repeal former section 1170.12, subdivision (a)(8) while retaining section 667, subdivision (c)(8), namely, if it were the case that the voters were reluctant to make significant changes in Three Strikes

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"evident" "legislative oversight" or "clerical misprision"]; *Washburn v. Lyons* (1893) 97 Cal. 314, 315 ["very clear" drafting error in statute—use of "and" instead of "or"—was reformed to reflect Legislature's intent].)

sentencing law on their own and wanted to give the Legislature (and only the Legislature) the ability to do away with the requirement for consecutive sequential sentencing by a simple majority vote rather than a two-thirds vote. This scenario is highly implausible.

For one thing, voters who enacted Proposition 36 were obviously quite willing to make significant changes in Three Strikes sentencing law—that is immediately apparent from the other changes in law made by Proposition 36, including the enactment of section 1170.126, which provided a means for those serving a Three Strikes sentence to seek retroactive relief. For another thing, there is nothing in the ballot materials that suggests the proponents were concerned in any respect about the two-thirds amendment threshold originally enacted and codified at section 1170.12, subdivision (g)—nothing, for example, about prior legislative efforts to eliminate the requirement for consecutive sequential sentencing that had majority support but failed solely because of the two-thirds threshold.

The expressions of intent that *are* found in the Proposition 36 ballot materials, though they do not directly speak to the issue at hand, suggest a wholesale deletion of the consecutive sequential sentencing requirement is what the voters had in mind (but accomplished imperfectly). The proponents of Proposition 36 sought to achieve twin objectives: to maintain a system of lengthy prison terms for dangerous, violent offenders while saving state resources—both money and prison space—by affording relief to those criminals who pose a lesser risk but were still serving life sentences. (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52 ["TOUGH AND SMART ON CRIME [¶] Criminal justice experts and law

enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform. Repeat criminals will get life in prison for serious or violent third strike crimes. Repeat offenders of non-violent crimes will get more than double the ordinary sentence. Any defendant who has ever been convicted of an extremely violent crime—such as rape, murder, or child molestation—will receive a 25 to life sentence, no matter how minor their third strike offense"].)

Complete elimination of the consecutive sequential sentencing requirement places greater focus on an offender's current crimes rather than his or her criminal history. This is fully consistent with the approach taken by other aspects of Proposition 36, chiefly, the amendments that required a "triggering" crime to itself be serious or violent so as to make an offender eligible for the Three Strikes law's harshest indeterminate sentence penalty. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) In addition, complete elimination of the sequential sentencing *requirement*, to give judges *discretion* to decide whether a particular offender is sufficiently dangerous or reprehensible to merit consecutive sentencing, is also consistent with other aspects of Proposition 36 that placed greater reliance on judges' discretionary assessments in individual cases. (See, e.g., § 1170.126, subd. (f).) This consistency with the overall purpose and approach of Proposition 36—combined with the weakness of the only rationale that could conceivably explain the initiative text as drafted—leaves us convinced that the failure to repeal section 1170.12, subdivision (a)(8) was a mere oversight. (Cf. *People v. Torres* (2018) 23 Cal.App.5th 185, 202 [Proposition 36's amendment of section 1170.12, subdivision (a)(7) without

also amending the analogous section 667, subdivision (c)(7) was an "oversight," and the conflict in law resulting from the oversight should be resolved by treating section 1170.12 as the controlling provision, which would give trial courts greater concurrent sentencing discretion].) We correct the error as courts have done in prior cases (see *ante* fn. 7) to reform section 667 consistent with the voters' intent and accordingly treat subdivision (c)(8) as if it were repealed by Proposition 36 along with former section 1170.12, subdivision (a)(8).

D. A Remand Is Appropriate to Permit the Trial Court to Exercise the Discretion It Has to Sentence Concurrently or Consecutively

"'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.]" (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remanding in light of amendment which vested courts with discretion to strike or dismiss firearm enhancements].)

Here, the record shows that when the trial court resentenced defendant, it believed it lacked the discretion to impose concurrent sentences. The trial court stated that, after reviewing the People's motion and after conducting additional research, it believed it "must" run the sentences in the instant

case consecutive to the sentence in the 35-Life Case. While there is a strong argument that the trial court's initial decision to run the sentence here concurrent with the sentence imposed in the 35-Life Case means we should simply modify the judgment to re-impose concurrent sentences, we believe the better practice is to remand to permit the trial court to redetermine the matter itself, informed by this opinion. That is what we will do.

DISPOSITION

Defendant's convictions are affirmed. Defendant's sentence is reversed and the matter is remanded for resentencing consistent with this opinion.

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BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.